FILED
United States Court of Appeals
Tenth Circuit

August 20, 2013

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: JERRY LEE WILLIAMS, Movant.	No. 13-3208 (D.C. Nos. 6:09-CV-01112-JTM & 6:03-CR-10140-JTM-1) (D. Kan.)

ORDER

Before **TYMKOVICH**, **GORSUCH**, and **PHILLIPS**, Circuit Judges.

Jerry Lee Williams seeks authorization to file a second or successive 28 U.S.C. § 2255 motion. Because Mr. Williams cannot meet the requisite conditions for authorization, we deny the motion.

Mr. Williams was found guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). He was sentenced as an armed career criminal to a 210-month term of imprisonment. On appeal, we affirmed the conviction, but vacated the sentence and remanded for resentencing. *See United States v. Williams*, 403 F.3d 1188, 1191 (10th Cir. 2005). Mr. Williams was resentenced to 180 months in prison—the mandatory minimum for an armed career criminal. He appealed from his resentencing, and we affirmed. *See United States v. Williams*, 184 F. App'x 730, 732 (10th Cir. 2006). Mr. Williams then filed a 28 U.S.C. § 2255 motion to vacate his sentence. The district court denied the motion, and we denied Mr. Williams'

request for a certificate of appealability. *See United States v. Williams*, 290 F. App'x 153, 154 (10th Cir. 2008).

Mr. Williams now seeks authorization to file a second or successive § 2255 motion to challenge his sentence, arguing that the facts triggering his mandatory minimum sentence were found by a judge, not a jury. He contends that the Supreme Court's recent decision in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), is a new rule of constitutional law that entitles him to authorization under 28 U.S.C. § 2255(h)(2). *Alleyne* overruled *Harris v. United States*, 536 U.S. 545 (2002), and held that under the Sixth Amendment:

> Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury.

Alleyne, 133 S. Ct. at 2155 (citation omitted).

Section 2255(h)(2) provides for authorization when second or successive § 2255 claims are based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." We need not decide whether *Alleyne* establishes a new rule of constitutional law because the second part of the § 2255(h)(2) requirement—that the case be "made retroactive to cases on collateral review by the Supreme Court"—has not been met. The Supreme Court interpreted this phrase in *Tyler v. Cain*, 533 U.S. 656, 662 (2001), concluding that "'made' means 'held' and, thus, the requirement is satisfied

only if this Court has held that the new rule is retroactively applicable to cases on collateral review."

The Supreme Court has not held that the *Alleyne* decision applies retroactively to cases on collateral review. Accordingly, Mr. Williams has not met the standard for authorization in § 2255(h)(2), and we deny his motion. This denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

ELISABETH A. SHUMAKER, Clerk